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In the Supreme Court of the United States

KENTUCKY RETIREMENT SYSTEMS, ET AL.,
PETITIONERS

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether proof that an employee benefit plan on its face requires older workers to be denied disability benefits available to younger workers or to receive fewer disability benefits than younger workers establishes a prima facie case of discrimination in violation of the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*

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BRIEF FOR THE RESPONDENT

STATEMENT

Respondent Equal Employment Opportunity Commission (EEOC) brought suit against petitioners Kentucky Retirement Systems (KRS), the Jefferson County Sheriff's Department, and the Commonwealth of Kentucky, alleging that the KRS disability retirement benefits plan discriminates on the basis of age in violation of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.*, as amended by the Older Workers Benefit Protection Act (OWBPA), Pub. L. No. 101-433, 104 Stat. 978. The district court granted summary judgment to petitioners. J.A. 24-33. The court held that the EEOC had not established a prima facie case that the KRS plan discriminated on the basis of age on the ground that the EEOC had failed to show that the plan was "discriminatory, either facially or through disparate

treatment combined with intent." J.A. 29. The court of appeals affirmed. J.A. 36-54. The court of appeals then granted rehearing en banc and reversed the judgment of the district court, holding that the KRS plan facially discriminates on the basis of age, and that such facial discrimination in the terms of an employee benefit plan establishes a prima facie disparate treatment claim without additional proof of discriminatory animus against older workers. J.A. 56-97.

1. The ADEA makes it "unlawful for an employer * * * [to] discriminate against any individual [age 40 or older] with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. 623(a)(1), 631(a). As amended by the OWBPA, the ADEA states that "[t]he term 'compensation, terms, conditions, or privileges of employment' encompasses all employee benefits, including such benefits provided pursuant to a bona fide employee benefit plan." 29 U.S.C. 630(*l*). The OWBPA also amended the ADEA to provide that it "shall not be unlawful for an employer * * * to observe the terms of a bona fide employee benefit plan * * * where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker." 29 U.S.C. 623(f)(2)(B)(i).

2. Under the KRS retirement plan, hazardous duty employees are eligible for unreduced normal retirement benefits at age 55 with five years of service, or after completing 20 years of service. J.A. 60 n.1; see Ky. Rev. Stat. Ann. §§ 16.505(15), 16.576(1), 16.577(2), 16.592(4) (LexisNexis 2003). The normal retirement benefit of a hazardous duty employee is generally calculated as 2.5% of the worker's final compensation multiplied by the number of years worked. *Id.* § 16.576(3); see J.A. 63. The KRS plan

does not cap or limit the length of service that will be used in calculating the amount of an individual's normal retirement benefit.[1] Thus, an employee may continue to work indefinitely beyond the date when he becomes eligible for an unreduced retirement benefit, accruing additional years of service that will increase his annual pension when he elects to retire.

The KRS plan also offers disability retirement benefits to certain hazardous duty workers. Ky. Rev. Stat. Ann. § 16.582 (LexisNexis Supp. 2007). In order to qualify for disability retirement benefits, a worker must "have sixty (60) months of service, twelve (12) of which shall be current service * * *. The service requirement shall be waived if the disability is a total and permanent disability or a hazardous disability and is a direct result of an act in line of duty." *Id.* § 16.582(2)(a). A hazardous duty worker is not eligible for disability retirement benefits if he is age 55 or older at the time he becomes disabled. *Id.* § 16.582(2)(b); see J.A. 39 & n.1, 61.

For disabled workers who are eligible for disability retirement benefits under Ky. Rev. Stat. Ann. § 16.582(2) (LexisNexis Supp. 2007), computation of those benefits is governed by Section 16.582(5). As in its calculation of a normal retirement benefit, KRS considers the final compensation of an individual hazardous duty worker, and uses the same 2.5% multiplier, when it calculates the amount of a disability retirement benefit. See *id.* §§ 16.576(3) 16.582(5). In calculating disability retirement benefits, however, KRS does not multiply those numbers by the

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[1] Under the KRS plan, the only limitation on the amount of an employee's normal retirement benefit is the "maximum benefit as set forth in the Internal Revenue Code." Ky. Rev. Stat. Ann. § 16.576(3) (LexisNexis 2003); *id.* § 61.595(1)(f) (2004).

employee's *actual* years of service. Rather, the statute provides that,

> *if the member's total service credit on his last day of paid employment in a regular full-time position is less than twenty (20) years, service shall be added beginning with his last date of paid employment and continuing to his fifty-fifth birthday.* The maximum service credit added shall not exceed the total service the member had on his last day of paid employment, and the maximum service credit for calculating his retirement allowance, including his total service and service added under this section, shall not exceed twenty (20) years.

Id. § 16.582(5)(a) (emphasis added); see J.A. 40 (explaining that KRS adds to the employee's actual years of service "the number of years remaining until the worker *would have* reached either normal retirement age or twenty years of service, but no more than the number of years already worked"); J.A. 40 n.2.[2]

Thus, if a 50-year-old hazardous duty worker with seven years of service becomes disabled, KRS will impute five additional years of service (the length of time remaining until the worker would have turned 55 and become eligible for normal retirement benefits on the basis of age) and will compute the employee's disability retirement benefits as

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[2] The KRS plan was amended in 2004, during the pendency of the EEOC's appeal from the grant of summary judgment in favor of petitioners. See J.A. 41 n.2, 65 n.2 (citing Ky. Rev. Stat. Ann. § 16.582(5)(b)). That amendment, which altered the calculation of disability benefits for employees newly hired on or after August 1, 2004, did not affect the benefits of any employee or retiree who was a KRS plan participant as of July 31, 2004. *Ibid.* The court of appeals did not address new Section 16.582(5)(b), see *ibid.*, and it is not at issue in this Court.

though the individual had served for 12 years. If a 50-year-old hazardous duty worker with 17 years of service becomes disabled, KRS will impute three additional years of service (the length of time remaining until the worker would have amassed 20 years of service and become eligible for normal retirement benefits on that ground) and will compute the disability retirement as though the individual had served for 20 years. A hazardous duty worker who becomes disabled *after* he has reached age 55, by contrast, is ineligible for disability retirement benefits and may receive only normal retirement benefits. Ky. Rev. Stat. Ann. § 16.582(2)(b) (LexisNexis Supp. 2007); see J.A. 61, 62. The amount of such benefits is based on the years such an individual *actually* worked, with no imputation of additional years that the employee *might have* worked if he had remained healthy. And even when a hazardous duty employee becomes disabled before he reaches age 55, KRS will impute (at most) only the number of additional years remaining before the individual's 55th birthday. As a result, a younger disabled worker may be credited with more imputed years of service than an older colleague, and thus receive higher disability retirement benefits, even though their *actual* years of service are the same.[3]

The consequence of the KRS scheme is that, when two hazardous duty workers with the same length of service and the same final compensation become disabled, the older worker's retirement benefits will often be lower, and will never be higher, than the benefits paid to the younger wor-

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[3] For example, if a 54-year-old employee with ten years of service becomes disabled, KRS will impute one additional year and will calculate the worker's disability retirement benefits as though he had served for 11 years. A 45-year-old disabled worker with ten years of service, by contrast, would be credited with ten imputed years, and his benefits would be calculated on the basis of 20 years of service.

ker. The opinion of the court of appeals panel includes a chart demonstrating how individuals with the same length of actual service (ten years) and the same final compensation ($50,000) will receive substantially different monthly retirement benefits depending on the ages at which they become disabled:

Age at Disability	Final Pay	# Years Service	Multiplier	Annual Benefits	Monthly Payment
55 or older	$50,000	10	10	$12,500	$1,041.66
53	$50,000	10	12	$15,000	$1,250.00
50	$50,000	10	15	$18,750	$1,562.50
48	$50,000	10	17	$21,250	$1,770.83
45 or younger	$50,000	10	20	$25,000	$2,083.33

J.A. 42.[4]

3. Charles Lickteig was employed in a hazardous duty position by the Jefferson County Sheriff's Department, a participant in the retirement system operated by KRS. J.A. 60. When Lickteig became unable to work due to disability, he applied to KRS for disability retirement benefits. *Ibid.* At that time, Lickteig was 61 years old and had

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[4] The KRS plan also guarantees a hazardous duty employee who is eligible for disability retirement and becomes disabled in the line of duty a monthly benefit of at least 25% of his monthly final rate of pay. Ky. Rev. Stat. Ann. § 16.582(6)(a) (LexisNexis Supp. 2007); see J.A. 63-64. If such an employee has dependent children, the employee is entitled to a dependent-child benefit of 10% of his monthly final rate of pay for each child, up to a maximum for all dependent children of 40% of his monthly final rate of pay. Ky. Rev. Stat. Ann. § 16.582(6)(b) (LexisNexis Supp. 2007); see J.A. 64. Those benefits are not available to an otherwise eligible employee in a hazardous job who becomes disabled in the line of duty after turning 55. Ky. Rev. Stat. Ann. § 16.582(2)(b) (LexisNexis Supp. 2007); see J.A. 64.

17 years and seven months of service. *Ibid.* KRS notified Lickteig that, under Kentucky law, he was ineligible for disability retirement because he was over 55 and in a hazardous position. J.A. 60-61.[5]

Lickteig filed a charge with the EEOC, alleging that he had been denied benefits because of his age. J.A. 61. The EEOC sought to resolve Lickteig's discrimination charge through informal means, but those efforts proved unsuccessful. J.A. 66. The EEOC then filed suit against petitioners KRS, the Jefferson County Sheriff's Office, and the Commonwealth of Kentucky, alleging that petitioners maintain an employee benefit plan that denies or pays fewer disability retirement benefits to older individuals because of age, in violation of the ADEA. *Ibid.* The EEOC sought declaratory, injunctive, and monetary relief for Lickteig and a class of individuals who were alleged to have suffered discrimination on the basis of age in the operation of the KRS disability retirement program. See J.A. 9-16.[6]

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[5] The affidavit of KRS's Director states that Lickteig worked for an additional year after his application for disability retirement benefits was denied. J.A. 18. The affidavit further states that Lickteig was then awarded unreduced normal retirement benefits; that he also purchased 22 months of military service pursuant to Ky. Rev. Stat. Ann. §§ 61.555 and 78.545(6); and that his benefits were then based on 245 months of service. J.A. 18-19 & nn. 1-2.

[6] The KRS plan also provides normal and disability retirement benefits to employees in non-hazardous positions. Such employees are eligible for unreduced normal retirement benefits at age 65 or after 27 years of service. Ky. Rev. Stat. Ann. § 61.510(18) (LexisNexis Supp. 2007); *id.* § 61.595(1) and (2)(b) (LexisNexis 2004). The normal retirement benefit of an employee in a non-hazardous job is approximately two percent of final compensation multiplied by years of service. *Id.* § 61.595(1). Like employees in hazardous positions, non-hazardous duty workers who become disabled after reaching normal retirement age (65) are ineligible for disability retirement benefits, and their normal retirement benefits are computed based on the number of years

Petitioners moved to dismiss the suit on Tenth and Eleventh Amendment immunity grounds, but the district court denied the motion, and the court of appeals affirmed. J.A. 66-67. On remand, the parties filed cross-motions for summary judgment. J.A. 67. Petitioners asserted both that the EEOC had not established a prima facie case of discrimination and that any such discrimination fell within an express statutory exception to the ADEA's general ban. J.A. 25; see 29 U.S.C. 623(f)(2)(B)(i) and (ii).

The district court granted summary judgment to petitioners. J.A. 24-33. The district court believed that the KRS plan was not "discriminatory, either facially or through disparate treatment combined with intent." J.A. 29. Relying in part on *Lyon* v. *Ohio Education Ass'n*, 53 F.3d 135 (6th Cir. 1995), the court stated that invalidation of the KRS plan would do "nothing to further the purpose of the ADEA, which is to prevent employers from making employment decisions (including provision of benefits) based on denigrating stereotypes about age." J.A. 28; see J.A. 27-29. The court concluded that petitioners had

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actually worked. Non-hazardous duty workers who become disabled before age 65, by contrast, may be eligible for disability retirement benefits. Such workers may be credited with imputed years of service, and their benefits may be increased accordingly. The EEOC's complaint in this case asserted claims on behalf of both hazardous and non-hazardous duty retirees. See J.A. 12. However, because Lickteig himself was a hazardous duty employee, and because analogous legal issues are raised by the ADEA's application to hazardous and non-hazardous duty workers covered by the KRS program, the parties and the courts below have focused their analysis on the plan's application to hazardous duty workers. See Pet. Br. 4 n.1; J.A. 26 n.1, 39, 61-62.

identified a legitimate nondiscriminatory reason for the use of age in the KRS disability retirement program:

> Service credits are intended to bring the disabled employee's service years up to the number he might have worked if he had not become disabled. The credits are an attempt to provide an employee who becomes disabled before normal retirement with benefits similar to those which, had the employee been capable of continuing work through normal retirement, he would have been entitled to receive.

J.A. 31.

4. A panel of the court of appeals affirmed. J.A. 36-54.

a. The panel acknowledged that KRS's scheme for computing retirement benefits "appears to disadvantage older workers by virtue of the fact that a class of workers, determined in significant part by age (actually youth), gets unworked years attributed to them for purposes of calculating the amount of disability retirement." J.A. 39-40. By contrast, the panel observed, "[w]hen workers are disabled after they become eligible for normal retirement, they receive only normal retirement benefits," which are computed on the basis of *actual* years of service. J.A. 40. The panel explained that,

> [u]nder this scheme, disability retirement benefits will often be greater than normal retirement benefits for employees with the same years of service (but less than twenty years of service) and the same final compensation. The employee who receives normal retirement benefits will be entitled to 2.5% of his final compensation times his actual service years, whereas the employee who will receive disability retirement benefits will receive the same 2.5% of his final compensation, but will have it multiplied by a number that is

higher than his actual years of service, leading to a higher benefit.

J.A. 41-42.

b. Notwithstanding those concerns, the panel concluded that the Sixth Circuit's prior decision in *Lyon* required affirmance of the district court's judgment. J.A. 44-54. The panel noted that the court in *Lyon* had "upheld an early retirement plan that attributed unworked years to younger workers in order to calculate benefits," even though the plan calculated older workers' benefits by reference to actual years of service. J.A. 44. The panel concluded that, "[b]ecause the retirement plan at issue in this case is materially indistinguishable from the early retirement incentive plan in *Lyon*, the Kentucky Retirement plan cannot be held to violate the ADEA." J.A. 48.

5. The court of appeals granted rehearing en banc, reversed the district court's grant of summary judgment for petitioners, and remanded for further proceedings. J.A. 56-97. The court held that the EEOC had "established a prima facie violation of the ADEA, because the KRS plan is facially discriminatory on the basis of age." J.A. 59. The court further ruled "that when an employment policy or benefit plan such as the KRS plan is facially discriminatory, a plaintiff challenging the policy does not need additional proof of discriminatory animus in order to establish a prima facie disparate-treatment claim." *Ibid.* The court concluded "that *Lyon*'s standard for a disparate-treatment age-discrimination claim is inconsistent with Supreme Court authority as well as the rulings of several of our sister circuits in cases involving the similar role of age in employee-benefit plans." *Ibid.* The court "therefore overrule[d] in part [its] previous decision in *Lyon*." *Ibid.*

The court of appeals explained that, under this Court's precedents, "an employer's reliance 'upon a formal, facially

discriminatory policy requiring adverse treatment of employees [on the basis of age]' establishes a prima facie disparate-treatment claim under the ADEA." J.A. 72 (quoting *Hazen Paper Co.* v. *Biggins*, 507 U.S. 604, 610 (1993)). Applying that principle to the facts of this case, the court concluded that the KRS plan "is facially discriminatory on the basis of age in at least two ways." J.A. 73. First, the court observed that the KRS plan "categorically excludes" employees over age 55 from disability benefits that are available to younger employees who are "similarly situated in all relevant respects other than age." J.A. 73-74. Second, the court explained that the KRS plan is facially discriminatory because "employees who become disabled when they are still 'young enough' to be eligible for disability-retirement benefits receive reduced benefits compared to otherwise-similar but even younger disabled employees for no reason other than their age." J.A. 74.

The court of appeals rejected petitioners' contention that the ADEA requires proof of a discriminatory animus against older workers. J.A. 77-81. The court explained that, under this Court's decisions, "[o]nce a plaintiff has established that a policy is facially discriminatory in that it classifies or disadvantages an employee 'because of' the employee's protected status, additional proof of discriminatory intent is not needed, as it is directly evidenced by the facially discriminatory nature of the policy itself." J.A. 78.

Chief Judge Boggs dissented. J.A. 83-97. He concluded that the KRS plan was lawful because the plan "considers age only in combination with years of service and years to retirement age." J.A. 84. Chief Judge Boggs would have upheld the plan as a "non-discriminatory way of providing workers with protection against disability before they have

had an opportunity to earn a normal pension at retirement age." *Ibid.*

SUMMARY OF ARGUMENT

The court of appeals correctly held that the EEOC has established a prima facie violation of the ADEA because the KRS plan facially discriminates on the basis of age, and that petitioners therefore were not entitled to summary judgment at this stage.

A. On their face, the KRS plan provisions governing disability retirement violate the ADEA's general ban on age-based employment criteria that disadvantage older workers. If a 60-year-old employee with 15 years of service becomes disabled, his retirement benefits under the KRS plan are calculated using his actual years of service. By contrast, a 50-year-old disabled worker with the same tenure and final compensation would be credited with five additional years of service and would receive a larger monthly benefit. The effect of the KRS plan provisions that govern disability retirement is that the benefits paid to older disabled workers will often be lower, and will never be higher, than the benefits paid to similarly situated younger employees. Because the KRS plan employs explicit age-based criteria that disadvantage older workers, the plan is facially discriminatory and violates the ADEA unless petitioners can establish on remand the cost-justification defense provided by 29 U.S.C. 623(f)(2)(B)(i).

B. The fact that Kentucky uses age 55 as an eligibility threshold for normal retirement benefits does not justify the age-based disparities in benefits just described. So far as the ADEA is concerned, Kentucky is free to provide payments to workers who become disabled before they can satisfy the State's age-and-service requirements for normal retirement benefits. The discriminatory feature of the KRS

plan is not that it renders those younger employees eligible for retirement benefits, but that it disadvantages older disabled workers by using age-based criteria to determine whether, and to what extent, additional years of service will be imputed for purposes of benefit computation. Because both 60- and 50-year-old disabled workers with at least five years of service would be entitled to retirement benefits under Kentucky law, the older worker's eligibility for "normal" retirement provides no basis for using a more generous formula to calculate the younger employee's benefits. The fact that the KRS plan advantages older *voluntary* retirees, by making 55-year-olds eligible for normal retirement benefits with as little as five years of service, likewise does not justify the State's age-based discrimination against older *disabled* workers. Favorable treatment of one class of older workers does not justify discrimination against a different group of older workers.

C. Because the KRS plan computes disability retirement benefits by using explicit age-based criteria that disadvantage older disabled workers, the plan is facially discriminatory, regardless of the State's justifications for those disparities. When a plaintiff shows that an employer has adopted a "facially discriminatory policy requiring adverse treatment of employees [on the basis of age]," *Hazen Paper Co.* v. *Biggins*, 507 U.S. 604, 610 (1993), it has made a prima facie case of "arbitrary age discrimination" within the meaning of the ADEA, without regard to whether a particular form of disparate treatment reflects invidious stereotypes. That conclusion reflects the settled rule that discriminatory intent is presumed in the case of facial discrimination, and that the alleged absence of a "malevolent motive" is not a defense when the challenged employment practice discriminates on its face. *International Union, UAW* v. *Johnson Controls*, 499 U.S.

187, 199 (1991). Acceptance of the justification proffered by petitioners in this case—*i.e.*, that older disabled workers are likely to be more self-sufficient financially than younger disabled employees with the same length of service—would be particularly disruptive, since that generalization could be used to legitimize any number of explicit age-based disparities in other benefits and even wages. Moreover, allowing facial discrimination to take place absent a "malevolent motive" cannot be squared with Congress's recognition of an affirmative defense that specifies the narrow circumstances in which a facially discriminatory plan is lawful.

D. The text and history of the OWBPA confirm that the ADEA in its current form prohibits the age-based disparities in the KRS plan unless petitioners can show that those disparities are cost-justified. The OWBPA was enacted in response to this Court's decision in *Public Employees Ret. Sys.* v. *Betts*, 492 U.S. 158 (1989), in which the Court applied the ADEA in its then-current form to an Ohio benefits plan that, like the KRS program, provided lower retirement benefits to an older disabled worker than a similarly situated younger employee would have received. The Court acknowledged the facially disparate treatment of older and younger workers under the Ohio plan. Based on its determination that the phrase "compensation, terms, conditions, or privileges of employment" in 29 U.S.C. 623(a)(1) (1988) did not encompass fringe benefits, however, the Court in *Betts* held that the challenged disparity would not violate the Act unless that disparity "was the result of an intent to discriminate in some non-fringe-benefit aspect of the employment relation." 492 U.S. at 182. In response to that decision, Congress enacted the OWBPA to make clear that the ADEA's general ban on age-based discrimination in employment *does* cover fringe benefits, while creating a new cost-justification defense. The OWBPA

removes any doubt that the ADEA in its current form prohibits the type of age-based disparities in the KRS plan, unless they are cost-justified.

E. Even if the ADEA were ambiguous with respect to the question presented here, this Court should defer to the EEOC's view that the Act prohibits the age-based disparities reflected in the KRS plan. The position taken by the EEOC in this case is consistent with a published regulation that Congress expressly incorporated by reference in the OWBPA, and with agency guidance that specifically addresses disability retirement provisions that impute additional years of service to younger employees.

ARGUMENT

The court of appeals held that the EEOC has established a prima facie case of age discrimination under the ADEA sufficient to preclude a grant of summary judgment for petitioners, and it remanded the case for further proceedings. That decision was based on the court's conclusion that it is sufficient for a plaintiff to show that a plan discriminates on its face on the basis of age in computing retirement benefits. That decision is correct and should be affirmed by this Court. On remand, petitioner will have an opportunity to show that its facially discriminatory plan fits within one of the Act's exceptions, such as the cost-justification defense. But petitioners were not entitled to summary judgment on the record before this Court.

A. The KRS Plan Is Facially Discriminatory Because It Mandates Adverse Treatment Of Many Older Disabled Workers On The Basis Of Their Age

1. The ADEA makes it "unlawful for an employer * * * [to] discriminate against any individual [age 40 or older] with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's

age." 29 U.S.C. 623(a)(1); see 29 U.S.C. 631(a). As amended by the OWBPA, the ADEA provides that "[t]he term 'compensation, terms, conditions, or privileges of employment' encompasses all employee benefits, including such benefits provided pursuant to a bona fide employee benefit plan." 29 U.S.C. 630(*l*). The ADEA thus generally "forbids discriminatory preference for the young over the old" in providing benefits to employees 40 and older, see *General Dynamics Land Sys., Inc.* v. *Cline*, 540 U.S. 581, 584 (2004), and "requires the employer to ignore an employee's age (absent a statutory exemption or defense)," *Hazen Paper Co.* v. *Biggins*, 507 U.S. 604, 612 (1993).

2. As the en banc court of appeals explained, "KRS does not dispute that its plan pays lower disability-retirement benefits to an older worker who, apart from age, is similarly situated to a younger worker in all relevant respects." J.A. 74. For example, if a 60-year-old worker with 15 years of service becomes disabled, the worker is ineligible for disability retirement benefits, and his normal retirement benefits are calculated using his *actual* years of service. The number 15 is then multiplied by the employee's final annual compensation, and the worker's annual retirement benefit is 2.5% of that product. In computing normal retirement benefits, even for an individual who has been forced to retire due to disability, KRS does not attempt to estimate and give credit for the number of additional years the retiree might have worked if he had remained healthy.

By contrast, if a 50-year-old employee with the same length of service becomes disabled, his retirement benefits are not calculated on the basis of his *actual* 15 years of service. Rather, under the terms of its disability retirement program, KRS will impute an additional five years of service and will calculate the worker's benefits as though he

had served for 20 years. See Ky. Rev. Stat. Ann. § 16.582(5)(a) (LexisNexis Supp. 2007); J.A. 40 & n.2. "Under this scheme," the court of appeals recognized, "disability retirement benefits will often be greater than normal retirement benefits for employees with the same years of service (but less than twenty years of service) and the same final compensation." J.A. 41-42. As a result, the 60-year-old individual will receive a significantly lower annual benefit than a 50-year-old worker who is otherwise similarly situated—*i.e.*, who has the same actual length of service and the same final compensation, and who has likewise been forced to retire due to disability.

The discriminatory character of the KRS program is not limited to its treatment of individuals who are older than 55 when they become disabled and who are therefore altogether ineligible for disability retirement benefits. Consider, for example, two hazardous duty workers, each of whom has ten years of service, who become disabled at ages 54 and 45 respectively. The older worker is eligible for disability retirement benefits, but KRS will impute only one additional year of service, and the employee's benefits will be calculated as though he had served for 11 years. The younger worker will receive 10 imputed years of service, and his benefits will be calculated as though he had served for 20 years. If the two employees have the same final compensation, the younger retiree will receive nearly twice as great an annual disability retirement benefit as the older individual, even though the two are similarly situated with respect to all relevant factors other than age.

3. The disparities described above reflect discrimination "because of [an] individual's age." 29 U.S.C. 623(a)(1). Both the relevant Kentucky statutes and KRS's course of conduct in this case reflect explicit age-based distinctions. Hazardous duty workers who are more than

55 years old are categorically excluded from eligibility for disability retirement benefits, regardless of their years of service. See Ky. Rev. Stat. Ann. § 16.582(2)(b) (LexisNexis Supp. 2007). Consistent with that statutory bar, Charles Lickteig was informed that, under Kentucky law, an individual "must * * * be under age 55 * * * to qualify for Disability Retirement," and that Lickteig himself was "not eligible to apply for Disability Retirement since [he was] over age 55." J.A. 61. And for purposes of calculating disability retirement benefits for persons who *are* eligible, Kentucky law states that, "if the member's total service credit on his last day of paid employment in a regular full-time position is less than twenty (20) years, service shall be added beginning with his last date of paid employment and continuing to his fifty-fifth birthday." Ky. Rev. Stat. Ann. § 16.582(5)(a) (LexisNexis Supp. 2007). The statute thus makes the distinctly advantageous feature of disability retirement under Kentucky law—*i.e.*, the availability of increased benefits reflecting imputed years of service that the employee might have worked if he had not become disabled—directly dependent on the individual's age.

The explicit age-based criteria in the statutory scheme can result in stark disparities between the benefits paid to otherwise similarly-situated individuals. When a hazardous duty worker covered by the KRS program is forced to retire due to disability, the determination of his eligibility and the computation of his benefits ordinarily involves a simple arithmetic calculation to which only three criteria are relevant: the employee's final compensation, his years of service, and his age at the time of retirement.[7] When the

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[7] As noted, see note 4, *supra*, when a hazardous duty employee suffers a disability in the line of duty, he is entitled to disability retirement benefits of no less than 25% of his final rate of pay, with additional benefits for any dependent children. Ky. Rev. Stat. Ann. § 16.582(6)(a)-

first two criteria are held constant and employees of different ages are compared, the benefits paid to the younger worker will often be higher, and will never be lower, than the benefits paid to the older employee. As the court of appeals panel recognized, the benefits paid to younger disabled workers can be as much as double the benefits paid to older employees who are similarly situated except with respect to age. J.A. 42; see p. 6, *supra*.

4. Petitioners' reliance (Br. 25-27) on *Hazen Paper* is misplaced. The Court in *Hazen Paper* considered and rejected an ADEA disparate-treatment claim asserted by an employee who had been fired because his pension benefits were about to vest based on his nearly ten years of service. 507 U.S. at 608-614. The Court recognized that the ADEA "requires the employer to ignore an employee's age (absent a statutory exemption or defense)." *Id.* at 612. The Court observed, however, that "an employee's age is analytically distinct from his years of service" because "[a]n employee who is younger than 40 * * * may have worked for a particular employer his entire career, while an older worker may have been newly hired." *Id.* at 611. "Because age and years of service are analytically distinct," the Court explained, "an employer can take account of one while ignoring the other, and thus it is incorrect to say that a decision based on years of service is necessarily 'age based.'" *Ibid.* The Court concluded that the decision "to fire an older employee solely because he has nine-plus years of service and therefore is 'close to vesting' would not constitute discriminatory treatment on the basis of age." *Id.* at 612; see *Smith* v. *City of Jackson*, 544 U.S. 228, 237-238 (2005) (explaining that the plaintiff in *Hazen Paper* "did not

(b) (LexisNexis Supp. 2007). Like the imputation of additional service years, those benefits are unavailable to workers who become disabled after age 55.

state a cause of action under a *disparate-treatment* theory" because the "motivating factor" for his discharge was not "the employee's age, but rather his years of service, a factor that the ADEA did not prohibit an employer from considering when terminating an employee").

Unlike the employer in *Hazen Paper*, administrators of the KRS program cannot "ignore an employee's age," as the ADEA generally requires, see *Hazen Paper*, 507 U.S. at 612, when a disabled worker applies for retirement benefits. The applicable Kentucky statutes require consideration of the applicant's age to determine whether, and to what extent, the worker will be credited with additional imputed years of service for purposes of benefit computation. Nor can petitioners plausibly claim that older workers in the circumstances described above (see pp. 16-17, *supra*) are disadvantaged based on a consideration, such as tenure of service, that is "analytically distinct" from age. *Id.* at 611. To the contrary, the essence of the disparate-treatment claim in this case is that older disabled employees will often receive significantly lower retirement benefits than KRS would have awarded to a younger disabled worker *with the same length of service*. See p. 6, *supra*. In short, the discriminatory feature of the Kentucky benefits system is the way in which age—not years of service—affects the computation of benefits.

As the en banc court of appeals recognized (see J.A. 73, 78), KRS's explicit reliance on age to calculate retirement benefits is analogous not to the termination decision involved in *Hazen Paper*, but to the employment practices that were held to be facially discriminatory in *City of Los Angeles Department of Water & Power* v. *Manhart*, 435 U.S. 702 (1978), and *International Union, UAW* v. *Johnson Controls, Inc.*, 499 U.S. 187 (1991). In *Manhart*, this Court held that a retirement plan that paid equal monthly re-

tirement benefits to similarly situated men and women, but required female employees to make larger monthly contributions to the pension fund, violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* *Manhart*, 435 U.S. at 705. The Court acknowledged that, in setting a higher contribution rate for female employees, the employer had not relied on "'stereotyped' impressions about the characteristics of males or females," or "a fictional difference between men and women." *Id.* at 707. Rather, the employer had based its decision on "a generalization that the parties accept as unquestionably true: Women, as a class, do live longer than men." *Ibid.* The Court held, however, that the employer's motives could not redeem a practice that, "on its face, discriminated against individual employees because of their sex." *Id.* at 716.[8]

In *Johnson Controls*, an employer adopted a policy of excluding fertile women, but not fertile men, from certain lead-exposed jobs. 499 U.S. at 190-192. The Court held that "Johnson Controls' policy is facially discriminatory because it requires only a female employee to produce proof that she is not capable of reproducing." *Id.* at 198. The Court further explained that "the absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect. Whe-

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[8] In *Arizona Governing Committee* v. *Norris*, 463 U.S. 1073 (1983), the Court held that a retirement plan that paid women lower monthly benefits than men who deferred the same amount of compensation violated Title VII. The Court relied on *Manhart*'s holding that a plan requiring women to make greater contributions than men discriminates because of sex "for the simple reason that it treats each woman in a manner which but for her sex would have been different." *Id.* at 1081 (citation, internal quotation marks, and brackets omitted). The Court concluded that "the classification of employees on the basis of sex is no more permissible at the pay-out stage of a retirement plan than at the pay-in stage." *Ibid.*

ther an employment practice involves disparate treatment through explicit facial discrimination does not depend on why the employer discriminates but rather on the explicit terms of the discrimination." *Id.* at 199. The Court concluded that the employer's policy was facially discriminatory because it "[did] not pass the simple test of whether the evidence shows 'treatment of a person in a manner which but for that person's sex would be different.'" *Id.* at 200 (quoting *Manhart*, 435 U.S. at 711 (in turn quoting United States Commission on Civil Rights Enforcement Effort, *Developments in the Law, Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 Harv. L. Rev. 1109, 1170 (1970))). The Court then considered and rejected the employer's contention that its exclusion of fertile women from the jobs in question fell within the "bona fide occupational qualification" (BFOQ) exception to Title VII's ban on sex-based employment discrimination. *Id.* at 200-207.

This Court's decisions in *Manhart* and *Johnson Controls* make clear that sex-based distinctions in employment are facially discriminatory even when they are adopted for benign reasons or are premised on accurate generalizations about male and female employees (*e.g.*, that the average woman lives longer than the average man). This Court's "interpretation of Title VII * * * applies with equal force in the context of age discrimination, for the substantive provisions of the ADEA were derived *in haec verba* from Title VII." *TWA* v. *Thurston*, 469 U.S. 111, 121 (1985) (citation and internal quotation marks omitted); accord *City of Jackson*, 544 U.S. at 233-234 (plurality opinion). Where, as here, "the evidence shows treatment of a person in a manner which but for that person's [age] would be different," *Johnson Controls*, 499 U.S. at 200 (quoting *Manhart*, 435 U.S. at 711) (internal quotation marks omitted),

the ADEA's general prohibition on age-based discrimination therefore similarly governs without regard to the employer's subjective motivations for adopting the practice in question.[9]

5. This does not mean that a plan that facially requires adverse treatment of older workers because of their age necessarily violates the ADEA. In certain respects, the ADEA's exceptions to the general ban on age-based discrimination in employment differ from the exceptions contained in Tile VII. For example, whereas Title VII lacks a cost-justification defense, *Manhart*, 435 U.S. at 716-717, the ADEA expressly includes such a defense. By its terms,

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[9] Although Title VII prohibits sex-based discrimination in employment regardless of whether male or female employees are advantaged, this Court has construed the ADEA not to address employment practices that *favor* older workers. See *Cline*, 540 U.S. at 586-600. Relying on *Cline*, petitioners contend (Br. 48) that, "[e]ven though classifications on the basis of gender or race are routinely viewed as facially discriminatory without any further reflection about the underlying motive," age-based classifications should be analyzed differently even when (as here) they disadvantage older workers. That argument lacks merit. The Court's analysis in *Cline* focused on the ADEA term "age," a word that does not appear in Title VII's anti-discrimination provision. See *id.* at 597 ("The term 'age' employed by the ADEA is not * * * comparable to the terms 'race' or 'sex' employed by Title VII."). The Court concluded that, for purposes of the ADEA's basic anti-discrimination provision, the term "'age' means 'old age.'" *Id.* at 596; see *id.* at 592 n.5. The Court did not suggest that the term "discriminate," which appears in both the ADEA and Title VII, see 29 U.S.C. 623(a)(1); 42 U.S.C. 2000e-2(a)(1), should be interpreted differently in the two statutes, and there is no basis for reaching that conclusion. Cf. *City of Jackson*, 544 U.S. at 233-234 (plurality opinion) (relying on Title VII precedents in holding that the ADEA authorizes disparate-impact claims); *id.* at 243 (Scalia, J., concurring in part and concurring in the judgment) (treating the Court's Title VII decisions as a ground for deferring to the EEOC's view that ADEA disparate-impact claims are cognizable).

that defense permits an employer "to observe the terms of a bona fide employee benefit plan * * * where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker." 29 U.S.C. 623(f)(2)(B)(i). But that *defense* is just that; it provides a specific circumstance in which a facially discriminatory plan is permissible. It does not suggest that some additional showing by the EEOC is necessary with respect to a facially discriminatory plan.

The ADEA also contains other exceptions. For example, it permits an employer to adopt a "voluntary early retirement incentive plan" that is consistent with the relevant provisions of the ADEA, 29 U.S.C. 623(f)(2)(B)(ii), and to deduct from long-term disability benefits the amount of pension benefits "for which an individual who has attained the later of age 62 or normal retirement age is eligible," 29 U.S.C. 623(*l*)(3)(B). The ADEA also permits an employer to adopt an employment practice that would otherwise be prohibited "where age is a [BFOQ] reasonably necessary to the normal operation of the particular business." 29 U.S.C. 623(f)(1); see note 15, *infra*. But absent proof of such a statutory exception, a plan that facially requires adverse treatment of older workers because of their age violates the ADEA.

Petitioners have argued in this case that the KRS plan's reduction in benefits for older workers—even if facially discriminatory—is lawful under the cost-justification defense in 29 U.S.C. 623(f)(2)(B)(i). The court of appeals did not rule on that issue, and petitioners may press that claim on remand.

B. The Fact That KRS Uses Age As A Criterion For Awarding Normal Retirement Benefits Does Not Excuse KRS's Age-Based Discrimination In The Provision Of Disability Retirement Benefits

Petitioners do not dispute that, in circumstances where a worker's age renders him ineligible for the imputed years of service that KRS's disability retirement plan provides, the worker may receive a lower retirement benefit than KRS would have paid to an employee with the same length of actual service who became disabled before age 55. Petitioners emphasize, however, that the KRS plan permissibly uses age as an eligibility criterion for normal retirement benefits. Petitioners contend that the KRS disability retirement plan is non-discriminatory because it differentiates on the basis of eligibility for normal retirement benefits, not on the basis of age qua age. That argument lacks merit.

1. Under the KRS plan, a hazardous duty worker 55 years of age or older is eligible for unreduced normal retirement benefits if he has at least five years of service. A younger employee, by contrast, must accumulate 20 years of service in order to qualify for unreduced normal retirement benefits. That use of age as a threshold for benefits is consistent with 29 U.S.C. 623(*l*)(1)(A), which states that an employer's use of "a minimum age as a condition of eligibility for normal or early retirement benefits" does not violate the ADEA's ban on age-based discrimination.[10] And even if the ADEA did not expressly auth-

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[10] In enacting the OWBPA, Congress recognized that "employee pension benefit plans" typically "establish a minimum age as a condition of eligibility for early or normal retirement benefits" by providing, for example, "that benefits are not payable until an individual reaches the age of 55, 60, or 65." S. Rep. No. 263, 101st Cong., 2d Sess. 20 (1990)

orize the establishment of a minimum age for retirement benefit eligibility, this Court's decision in *Cline* would foreclose any contention that such a requirement violates the Act by discriminating against younger workers. See note 9, *supra*. Petitioners are therefore correct that the ADEA does not prohibit *all* uses of age as a criterion for awarding retirement benefits.

The fact that an age-55 cut-off is permissibly used for one purpose, however, does not mean that it ceases to be an age-based criterion. Petitioners could not mandate, for example, that workers who are eligible for normal retirement benefits, but who choose to remain in the work force, will be paid lower wages than employees who do not qualify for normal retirement. Precisely because age-based thresholds are so commonly used as prerequisites for retirement benefits, the ADEA's general ban on age-based discrimination would be easily circumvented if eligibility for retirement could routinely be treated as a legitimate "non-discriminatory" ground for discriminating, with respect to *other* employment-related decisions, against workers who have reached that age-based threshold.

Petitioners' argument is particularly unavailing in light of this Court's decision in *Cline*. The Court in *Cline* held that, for purposes of the ADEA's ban on age-based discrimination, employment practices that advantage older workers are not properly analogized to practices that adversely affect older employees. See 540 U.S. at 590-594.

(*OWBPA Senate Report*); H.R. Rep. No. 664, 101st Cong., 2d Sess. 38 (1990) (*OWBPA House Report*). Congress enacted Section 623(*l*)(1)(A) in order "to make clear that this practice, a universally accepted part of pension plan design * * *, does not violate the ADEA's prohibition against differential benefits based on age." *OWBPA Senate Report* 20; *OWBPA House Report* 38.

Petitioners' effort to equate the two—*i.e.*, its argument that if KRS can differentiate *in favor* of older workers in determining eligibility for normal retirement benefits, it can turn around and use the same age-55 threshold as a basis for paying older disabled employees *lower* benefits than similarly situated younger disabled workers would receive—cannot be reconciled with *Cline*.[11]

2. Petitioners contend (Br. 21) that "[t]his case is here because Kentucky opted to boost unfortunate employees who become disabled *before* reaching eligibility for normal retirement." That description both overstates the practical effect of the court of appeals' decision and ignores the feature of the KRS program that causes it to discriminate on the basis of age. The ADEA does not preclude KRS from extending unreduced retirement benefits to persons under the age of 55 who have between five and 20 years of service and are forced to retire due to disability. If the benefits for that category of retirees were calculated on the same basis as the benefits for older retirees—*e.g.*, on the basis of *actual* years of service—inclusion of the younger workers within the class of eligible beneficiaries would not result in age-based discrimination. Nor would the ADEA be violated simply because KRS chose to describe the payments made to younger workers as "disability" retirement

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[11] Petitioners suggest (*e.g.*, Br. 36-37) that, because KRS's eligibility for normal retirement benefits can be premised on length of service as well as on age, the eligibility criteria for disability retirement benefits have the same potential to disadvantage more senior workers that they have to disadvantage older employees. That is incorrect. Under the KRS program, there is *no* scenario in which, as between two disabled employees who are similarly situated with respect to all factors except length of service, the more junior employee will receive a higher retirement benefit. In a broad range of circumstances, by contrast, a younger disabled employee will receive a higher benefit than an otherwise similarly situated older disabled worker. See pp. 16-17, *supra*.

benefits and the payments made to older workers as "normal" retirement benefits. See J.A. 82 (Rogers, J., concurring separately) ("[I]t is not facial discrimination to give older workers one kind of retirement plan and younger workers the same plan with a different name.").

The discriminatory feature of the actual KRS program is not that younger disabled persons are made *eligible* for retirement benefits, but that their benefits are computed using a formula that is more generous than the one used for older workers. And, as the relevant provisions of Kentucky law make clear, the imputation of additional years of service is unnecessary to effectuate the legislature's intent that disabled persons should receive unreduced retirement benefits even if they cannot satisfy the age-and-service requirements that apply to voluntary retirees. The class of persons who are *eligible* for disability retirement benefits is defined by Ky. Rev. Stat. Ann. § 16.582(2) (LexisNexis Supp. 2007) to include persons who "have sixty (60) months of service, twelve (12) of which shall be current service." The statutory authorization for imputation of additional service credits is contained in a *different* provision, see *id.* § 16.582(5)(a), which governs *computation* of disability retirement benefits for persons whose eligibility has been established. The evident purpose and effect of using imputation is to increase the *amount* of benefits paid to disabled persons who have *already* been identified as eligible, by crediting them for years that they might have worked if they had remained healthy.[12]

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[12] The KRS plan does not disadvantage *every* older disabled worker on the basis of age. For example, a hazardous duty worker with 20 or more years of service who becomes disabled after age 55 will not suffer any age-based discrimination. Because a younger disabled worker with 20 or more years of service would not be credited with any additional imputed service time, see Ky. Rev. Stat. Ann. § 16.582(5)(a) (LexisNexis

Thus, Kentucky's decision to impute *additional* years of service to certain disabled hazardous duty workers (*i.e.*, those who are younger than 55 and have between five and 20 years of service) does not follow inevitably or even naturally from the determination that such persons should be *eligible* for retirement benefits. Rather, the State's decision to use age-based criteria to determine whether additional years will be imputed is a distinct policy choice that requires its own justification. And once it is understood that benefit eligibility is distinct from benefit computation, petitioners' principal rationale for excluding workers older than 55 from the disability retirement program—*i.e.*, that such workers (assuming they have at least five years of service) are already eligible for normal retirement benefits—is a patently inadequate justification for refusing to impute additional service years to older disabled workers. Pursuant to Ky. Rev. Stat. Ann. § 16.582(2)(a) (LexisNexis Supp. 2007), disabled workers with at least five years of service are *also* eligible for retirement benefits, and they would continue to be eligible even if the imputation provision contained in Section 16.582(5)(a) were deleted from the statute. The fact that

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Supp. 2007), the older and younger workers' retirement benefits would both be computed based on actual years of service, and no disparate treatment would exist. But that is not enough. It is undisputed that *some* older disabled workers receive lower retirement benefits than KRS would pay to younger disabled workers who are similarly situated in all relevant respects other than age. The ADEA protects "any *individual*" over age 40 from discrimination "because of *such individual's* age." 29 U.S.C. 623(a)(1) (emphases added). The fact that the KRS plan does not discriminate against every older disabled worker is therefore immaterial to whether the plan discriminates against those older disabled workers who, but for their age, would have been entitled to larger retirement benefits.

older disabled workers are eligible for normal retirement benefits therefore does not meaningfully distinguish them from the younger disabled workers or justify use of a more generous formula in computing the younger workers' benefits.[13]

3. Petitioners contend that "Kentucky finds itself sued precisely because it derived a retirement plan that was especially attractive to older workers." Pet. Br. 51; see *id.* at 16-17. In support of that assertion, petitioners rely on the fact that, under the KRS plan, 55-year-old hazardous duty workers with as little as five years of service are entitled to normal retirement benefits. Petitioners' argument lacks merit.

Petitioners are correct that the KRS plan gives relatively favorable treatment to *one* class of older hazardous duty workers: those who are 55 years old or older, who have between five and 20 years of service, *and who choose to retire voluntarily*. Workers within that class are eligible for unreduced normal retirement benefits, even though voluntary retirees who are younger than 55 must have 20 years of service to qualify for such benefits. That differentiation in favor of older workers is not prohibited—in-

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[13] On a prospective basis, Kentucky could render the KRS program non-discriminatory either by making older disabled workers eligible for disability retirement benefits and imputing additional years of service on an age-neutral basis, or by calculating disability retirement benefits for younger workers on the basis of actual years of service. To the extent that Kentucky is motivated by an understandable impulse to ensure that all disabled employees have an adequate minimum level of benefits, the State can achieve that objective without using any age-based criteria. Alternatively, the State may seek to establish that its disparate treatment of older and younger disabled workers is exempt from the ADEA's general ban on age discrimination under the cost-justification defense contained in 29 U.S.C. 623(f)(2)(B)(i).

deed, is specifically authorized—by the ADEA. See pp. 25-26, *supra*.

The instant case, however, involves the application of the KRS plan to a different class of older hazardous duty workers. The employees on whose behalf the EEOC has sued have not *chosen* to retire but have been forced to do so by reason of disability. Because the ADEA prohibits KRS from "discriminat[ing] against any individual * * * because of such individual's age," 29 U.S.C. 623(a)(1), the fact that the KRS plan (permissibly) favors older *voluntary* retirees does not excuse its adverse treatment of older *disabled* workers. See note 12, *supra*. Especially in light of *Cline*, favorable treatment of one class of older workers does not justify discrimination *against* a different class of workers based on their relatively old age.

Petitioners are also wrong in suggesting that the plan's age-based discrimination against older disabled workers follows inevitably from the State's relative generosity to older voluntary retirees. As explained above, Kentucky is free to provide normal retirement benefits to hazardous duty workers age 55 or older who retire voluntarily with as little as five years of service, and it is also free to provide disability benefits to younger disabled workers with comparable tenure. See pp. 27-28, *supra*. The State's potential liability under the ADEA does not result from either of those choices or from the two in combination, but from the State's further decision to use age-based criteria in imputing additional years of service to younger employees for purposes of disability-benefit computation. Because that decision was in no way compelled by the State's choice of eligibility criteria for normal retirement benefits, petitioners are wrong to contend (Br. 51) that the State has been sued "because it derived a retirement plan that was especially attractive to older workers."

C. Petitioners' Proffered Justification For The KRS Plan's Facial Age-Based Disparities In Retirement Benefits Provides No Basis For Avoiding Liability Under The ADEA

Petitioners contend (Br. 42-51) that, even if the KRS plan results in disparate treatment of employees on the basis of age, the plan does not violate the ADEA because it is not in fact premised on invidious stereotypes about older workers. Petitioners rely in part on the references in the preliminary statement of findings and purpose of the ADEA to Congress's objective of eliminating "arbitrary" age discrimination. Br. 43 (citing 29 U.S.C. 621(a)(2), (4), and (b)). Based on those references, petitioners suggest (Br. 23) that a State may permissibly distinguish on the face of a retirement plan between older and younger disabled workers (by imputing additional years of service to the younger but not the older employee) because the older worker has had additional years to accumulate funds and the younger worker therefore "is likely to need more of a boost." That argument reflects its own stereotypes and for a number of reasons lacks merit.

1. In order to identify the forms of age discrimination that Congress sought to eliminate as "arbitrary," a court "must look for guidance to the substantive prohibitions of the Act itself, for these provide the best evidence of the nature of the evils Congress sought to eradicate." *Public Employees Ret. Sys.* v. *Betts*, 492 U.S. 158, 176 (1989). The ADEA's substantive prohibitions do not seek to eradicate "arbitrary age discrimination," 29 U.S.C. 621(b), by requiring a court to decide in each case whether a particular form of age-based disparate treatment reflects denigrating stereotypes. Nor does the condemnation of "arbitrary age discrimination" suggest a preference for "purposeful age discrimination." Rather, the Act reflects the

belief that most purposeful discrimination on the prohibited basis is, in fact, arbitrary in the sense of being reflective of stereotypes rather than legitimate factors.[14]

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[14] As this Court has observed, the ADEA's references to "arbitrary" age discrimination were likely drawn from a report submitted to Congress in 1965 by Secretary of Labor W. Willard Wirtz. See *Cline*, 540 U.S. at 587 n.2, 590; Report of the Secretary of Labor, *The Older American Worker: Age Discrimination in Employment* (June 30, 1965) (*Wirtz Report*). The *Wirtz Report* concluded, inter alia, "that there was little discrimination arising from dislike or intolerance of older people, but that 'arbitrary' discrimination did result from certain age limits." *City of Jackson*, 544 U.S. at 232. Secretary Wirtz viewed "arbitrary" age discrimination as involving the rejection of older workers based on "assumptions about the effect of age on their ability to do a job *when there is in fact no basis for these assumptions*." *Wirtz Report* 2; see *Cline*, 540 U.S. at 587 n.2. Because Secretary Wirtz specifically distinguished that phenomenon from discrimination reflecting "dislike or intolerance of older people," *City of Jackson*, 544 U.S. at 232, the Secretary's conception of "arbitrary" age discrimination clearly did not require age-based animus or an invidious motive. Under the heading "Arbitrary Age Discrimination: Specific Age Limits," the *Wirtz Report* stated that "[t]he most obvious kind of age discrimination in employment takes the form of employer policies of not hiring people over a certain age, without consideration of a particular applicant's individual qualifications." *Wirtz Report* 6; see *City of Jackson*, 544 U.S. at 255 (O'Connor, J., concurring in the judgment). The Secretary thus treated an employment practice that categorically excludes older workers on the basis of age, without regard to the individual characteristics of a particular employee, as a paradigmatic example of "arbitrary" age discrimination. Although the *Wirtz Report* focused on refusals to hire rather than on the formulae used to calculate employee benefits, KRS's blanket refusal to impute additional years of service to disabled hazardous duty workers beyond the age of 55, and the plan's consequent facial discrimination against older disabled workers in the computation of retirement benefits, constitute a benefits-related analog to the discriminatory employment practices that the *Wirtz Report* characterized as "arbitrary." And, as explained in Part D below, Congress enacted the OWBPA "to make unmistakably clear that the

Accordingly, the Act's substantive prohibitions make it unlawful for an employer to "discriminate" against an older worker "because of such individual's age," 29 U.S.C. 623(a)(1), unless the discrimination falls within one of the ADEA's specified statutory exceptions, such as the exception for benefit plans that are justified by differences in cost, see 29 U.S.C. 623(f)(2)(B)(i). Thus, if an employment practice facially treats older workers less favorably than younger workers because of their age, and if it does not fall within one of the statutory exceptions to Section 623(a)(1)'s general ban, it is by definition "discriminat[ion]" prohibited by the ADEA. That conclusion is reinforced by the fact that in interpreting the key anti-discrimination provision in Title VII on which Section 623(a)(1) was based, this Court has held that facial discrimination on the basis of a prohibited characteristic violates Title VII without regard to whether a plaintiff can identify a "malevolent motive." *Johnson Controls*, 499 U.S. at 199; see pp. 20-23, *supra*.

2. Petitioners have made no effort to demonstrate empirically that workers who become disabled after age 55 are likely to have greater accumulated financial resources than workers with equivalent years of service who become disabled at an earlier age. Instead, they have relied on stereotypical assumptions of the kind the ADEA seeks to eradicate. But even if petitioners could establish a statistical correlation between age and financial wherewithal, the generalization clearly would not be true in every instance, and the correlation would not justify use of age as a proxy for a factor like financial self-sufficiency that could be addressed directly. See *Hazen Paper*, 507 U.S. at 611 (explaining that, under the ADEA, "[t]he employer cannot

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ADEA's purpose of eliminating arbitrary age discrimination in employment includes the elimination of age discrimination in all forms of employee benefits." S. Rep. No. 263, 101st Cong., 2d Sess. 16.

rely on age as a proxy for an employee's remaining characteristics, * * * but must instead focus on those factors directly").

In construing the parallel ban on sex-based discrimination under Title VII, the Court in *Manhart* recognized the statistical validity of the generalization that "[w]omen, as a class, do live longer than men." 435 U.S. at 707. The Court observed, however, that the generalization does not hold true in every instance, see *id.* at 707-708, and concluded that "[e]ven a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply," *id.* at 708. The Court emphasized that Title VII "makes it unlawful 'to discriminate against any *individual* * * * because of such *individual's* race, color, religion, sex, or national origin,'" and it held that "[t]he statute's focus on the individual is unambiguous. It precludes treatment of individuals as simply components of a racial, religious, sexual, or national class." *Ibid.* (quoting 42 U.S.C. 2000e-2(a)(1)).

Because the ADEA similarly prohibits age-based discrimination against "any individual * * * because of such individual's age," 29 U.S.C. 623(a)(1), the same analysis applies here. See note 12, *supra*. It is true that Congress's enactment of the ADEA was prompted in part by its view that many age-based employment practices reflected *inaccurate* stereotypes about older workers. See *EEOC* v. *Wyoming*, 460 U.S. 226, 231 (1983) (explaining that, at the time the ADEA was enacted, "the available empirical evidence demonstrated that arbitrary age lines were in fact generally unfounded and that, as an overall matter, the performance of older workers was at least as good as that of younger workers"). Nothing in the text of the ADEA or this Court's ADEA jurisprudence suggests, however, that the Act invited defendants to try to escape

liability by documenting the accuracy of their stereotypical assumptions. Instead, Congress provided specific defenses and otherwise prohibited use of age as a proxy that works to the detriment of older workers.

Thus, where (as here) an employment practice *expressly* mandates that an older worker receive less favorable treatment than a similarly situated younger employee, Section 623(a)(1)'s basic prohibition on age-based discrimination applies without regard to the proffered rationale for the disparity. That conclusion squares with the settled rule that discriminatory intent is present whenever there is facial discrimination. See *Johnson Controls*, 499 U.S. at 199. In particular instances, the accuracy of such generalizations may be relevant to the application of a statutory exemption or defense, such as the cost-justification defense for cases involving age-based disparities in employee benefits. See 29 U.S.C. 623(f)(2)(B)(i). The possibility that the KRS plan might ultimately be upheld on that basis on remand, however, does not call into question the plan's facially discriminatory character. To the contrary, Congress's enactment of Section 623(f)(2)(B)(i), and its directive that the employer "shall have the burden of proving" that defense, 29 U.S.C. 623(f)(2), would be superfluous if the ADEA's basic prohibition were limited to age-based disparities that are necessarily premised on invidious stereotypes. Congress wisely chose a regime of specific, objective defenses over a regime in which certain "non-malevolent motives" for facially discriminatory laws would preclude the establishment of a prima facie case.[15]

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[15] Similarly in construing the BFOQ defense under the ADEA, see p. 24, *supra*, this Court has recognized that the defense cannot be established simply through proof of a statistical correlation between age and an essential job qualification. Rather, the employer must show either that "all or substantially all" persons above a particular age would

The use of age as a proxy for financial wherewithal is both unnecessary and potentially dangerous. To the extent that Kentucky wishes to ensure that disabled workers have some minimum level of financial support, the State can achieve that objective directly through age-neutral measures rather than relying on age as a proxy. Conversely, if the purported correlation between age and financial self-sufficiency could legitimize the payment of lower retirement benefits to older disabled workers than to identically situated younger employees, it presumably could support similar differentials in other benefits and even in wages in an effort to give younger employees "more of a boost." Such an approach would eviscerate the ADEA's protections and would strike at the heart of what the Act was designed to prevent.[16]

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be unable to perform the relevant job safely and effectively, or that it would be "impossible or highly impractical" to conduct an individualized inquiry into the fitness of particular older workers. *Western Air Lines, Inc.* v. *Criswell*, 472 U.S. 400, 414 (1985) (quoting *Usery* v. *Tamiami Trail Tours, Inc.*, 531 F.2d 224, 235 (5th Cir. 1976)) (internal quotation marks omitted); see *id.* at 412-417, 421-423. That narrow construction of the BFOQ defense, see *id.* at 422 (recognizing that Congress intended the defense to be a "limited exception" to the general ban on age-based discrimination) would be effectively negated if the existence of a statistical correlation between age and a legitimate employment criterion rendered Section 623(a)(1)'s general ban inapplicable.

[16] The district court upheld the KRS plan, including the imputation of service credits for disabled employees under age 55 who have less than 20 years of service, on the somewhat different rationale that "[s]ervice credits are intended to bring the disabled employee's service years up to the number he might have worked if he had not become disabled." J.A. 31. That rationale also lacks merit, essentially for the reasons stated in the text. Presumably some statistical correlation exists between an employee's age at the time of disability and the number of additional years he would have worked if he had remained healthy. But a desire to pay each employee the retirement benefits that he would

D. The Text And History Of The OWBPA Confirm That KRS's Age-Based Discrimination In Awarding Disability Retirement Benefits Is Prohibited By The ADEA Unless The OWBPA's Cost-Justification Defense Applies

Congress's enactment of the OWBPA bolsters the conclusion that facially discriminatory benefits plans like KRS's are prohibited by the ADEA except when the cost-justification defense applies.

1. In *Betts*, this Court applied the ADEA in its then-current form to an Ohio state-sponsored benefit plan similar to the program at issue in this case. The plaintiff in *Betts* was disqualified because of her age (61) from receiving disability retirement benefits, which would have totaled $355 per month, and instead received normal retirement benefits of $158.50 per month. 492 U.S. at 163. This Court recognized that the ADEA "forbids arbitrary discrimination by public and private employers against employees on account of age," *id.* at 161, and that "[o]n its face, the [State's] statutory scheme renders covered employees ineligible for disability retirement once they have attained age 60," *id.* at 166. At the time *Betts* was decided, however, the ADEA provided that it was not unlawful for an employer "to observe the terms of . . . any bona fide employee benefit plan * * * which is not a subterfuge to evade the purposes of [the Act]." *Id.* at 165 (quoting 29 U.S.C. 623(f)(2) (1988)). The Court therefore

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have earned if he had not become disabled cannot justify KRS's approach, which effectively (and irrebuttably) presumes that *no* employee who is disabled after age 55 would have worked an additional day.

stated that it "must consider the meaning and scope of the § [623](f)(2) exemption." *Id.* at 161; see *id.* at 166-182.[17]

The Court in *Betts* rejected the EEOC's view that the former Section 623(f)(2) exemption was limited to benefit plans in which any age-based differentials were cost-justified. See 492 U.S. at 173-175 (discussing 29 C.F.R. 1625.10(b) (1988)). The Court instead concluded that "a post-Act plan cannot be a subterfuge to evade the ADEA's purpose of banning arbitrary age discrimination unless it discriminates in a manner forbidden by the substantive provisions of the Act." *Id.* at 176. The Court found that construction necessary to ensure that the former Section 623(f)(2) exemption was given meaningful practical effect. The Court explained:

> The phrase "compensation, terms, conditions, or privileges of employment" in § [623](a)(1) can be read to

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[17] In *United Air Lines, Inc.* v. *McMann*, 434 U.S. 192 (1977), the Court held that a benefits plan adopted before passage of the ADEA in 1967 could not by its nature be a "subterfuge" to evade the purposes of the Act. *Id.* at 203; see *Betts*, 492 U.S. at 167 (discussing *McMann*). Petitioners contend (Br. 39-40) that the Court in *Betts*, in holding that the Ohio benefits plan was not a "subterfuge" within the meaning of former Section 623(f)(2), relied on the fact that the State's exclusion of employees over age 60 from disability retirement benefits had been enacted before 1974, when the ADEA was made applicable to the States. That is incorrect. The Court in *Betts* explained that, while the exclusion of older employees from disability retirement benefits was adopted before 1974, the practical disparity between disability and normal retirement benefits resulted from a separate statutory provision enacted in 1976, which changed the formula for calculating disability retirement benefits. See 492 U.S. at 163, 169. The Court held that, "to the extent this new rule increased the age-based disparity caused by the pre-Act age limitation, *McMann* does not insulate it from challenge." *Id.* at 169. The Court therefore conducted "an inquiry into the precise meaning of the § [623](f)(2) exemption in the context of post-Act plans." *Ibid.*

> encompass employee benefit plans of the type covered by § [623](f)(2). Such an interpretation, however, would in effect render the § [623](f)(2) exemption nugatory with respect to post-Act plans. Any benefit plan that by its terms mandated discrimination against older workers would also be facially irreconcilable with the prohibitions in § [623](a)(1) and, therefore, with the purposes of the Act itself. It is difficult to see how a plan provision that expressly mandates disparate treatment of older workers in a manner inconsistent with the purposes of the Act could be said not to be a subterfuge to evade those purposes, at least where the plan provision was adopted after enactment of the ADEA.

Id. at 177.

To avoid an "interpretation [that] would eviscerate § [623](f)(2)," the Court in *Betts* construed the Act "as exempting the provisions of a bona fide benefit plan from the purview of the ADEA so long as the plan is not a method of discriminating in other, non-fringe-benefit aspects of the employment relationship." 492 U.S. at 177. The Court observed that, "under this construction of the statute, Congress left the employee benefit battle for another day, and legislated only as to hiring and firing, wages and salaries, and other non-fringe-benefit terms and conditions of employment." *Ibid.* The Court further explained that, so construed, "§ [623](f)(2) is not so much a defense to a charge of age discrimination as it is a description of the type of employer conduct that is prohibited in the employee benefit plan context." *Id.* at 181.

2. The OWBPA was enacted into law approximately 16 months after this Court's decision in *Betts*. The text of the enacted law expressed Congress's view that, "as a result of the decision" in *Betts*, "legislative action [wa]s necessary to

restore the original congressional intent in passing and amending the [ADEA], which was to prohibit discrimination against older workers in all employee benefits except when age-based reductions in employee benefit plans are justified by significant cost considerations." Older Workers Benefit Protection Act, Pub. L. No. 101-433, § 101, 104 Stat. 978 (29 U.S.C. 621 note). To achieve that objective, Congress amended the ADEA's definitional section to provide that "[t]he term 'compensation, terms, conditions, or privileges of employment' encompasses all employee benefits, including such benefits provided pursuant to a bona fide employee benefit plan." § 102, 104 Stat. 978 (29 U.S.C. 630(*l*)). Congress also deleted the "subterfuge" exemption contained in former 29 U.S.C. 623(f)(2) (1988). See OWBPA § 103(1), 104 Stat. 978. In its place, Congress substituted new language stating that the ADEA does not prohibit an employer from implementing a benefit plan "where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker, as permissible under section 1625.10, title 29, Code of Federal Regulations (as in effect on June 22, 1989)." § 103(1), 104 Stat. 979 (29 U.S.C. 623(f)(2)(B)(i)).[18]

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[18] Because the decision in *Betts* concerned a state-sponsored benefit plan for public employees, Congress was aware that the ADEA, as amended by the OWBPA, would require adjustments to such plans. Congress sought to accommodate the States' needs through several provisions. First, Congress enacted "a special rule authorizing" state and municipal employers to offer existing employees the opportunity to "make a one-time election to retain coverage under the old plan for disability benefits or to be covered under new disability benefits that conform to the amendments made by this bill." *Explanation of S. 1511*, 136 Cong. Rec. 27,060 (1990); see OWBPA § 105(c)(2), 104 Stat. 981 (29 U.S.C. 623 note). Second, Congress gave state and local governments "two years from the date of enactment to bring their plans into com-

The clear thrust of the Court's analysis in *Betts* was that, if the ADEA's prohibition on age-based discrimination in "compensation, terms, conditions, or privileges of employment" had been construed to encompass retirement and other fringe benefits, the Ohio plan at issue in that case would have been unlawful. The Court declined to adopt that interpretation of the statutory phrase, however, because it concluded that to do so would effectively negate the ADEA's exemption for bona fide employment benefit plans. Congress responded to this Court's decision by defining the ADEA term "compensation, terms, conditions, or privileges of employment" to *include* employee benefits; by deleting the prior broad statutory exemption for any bona fide employee benefit plan that is not a "subterfuge" to evade the Act's purposes; and by enacting a new, narrower exemption for benefit plans in which age-based disparities are cost-justified. In light of the sequence of events that led up to the OWBPA's enactment, the amendments effected by the OWBPA manifest Congress's unambiguous intent that age-based distinctions like those in the KRS plan should be treated as facially discriminatory.[19]

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pliance," while private employers with existing plans that were not subject to collective bargaining had "180 days to be brought into compliance." 136 Cong. Rec. at 27,060; see OWBPA § 105(a) and (c)(1), 104 Stat. 981 (29 U.S.C. 623 note). And third, in response to "[s]ome States" that had "indicated a lack of familiarity with actuarial practices that are well-established in the private sector," 136 Cong. Rec. at 24,607 (statement of Sen. Pryor), Congress directed the EEOC and other federal agencies, upon request, to "provide assistance to state and local governments in identifying and securing independent technical advice" to assist in complying with the new legislation. *Id.* at 27,060; see OWBPA § 105(c)(3), 104 Stat. 982 (29 U.S.C. 623 note).

[19] To eliminate the "double dipping" that could occur if an employee eligible for pension benefits were also entitled to receive long-term disability benefits, the OWBPA permits an employer to deduct from an

3. The OWBPA's legislative history reinforces that view of the statutory language. The Senate and House Reports accompanying the OWBPA explained that, "[t]hrough this legislation, Congress intends to make unmistakably clear that the ADEA's purpose of eliminating arbitrary age discrimination in employment includes the elimination of age discrimination in all forms of employee benefits." *OWBPA Senate Report*; *OWBPA House Report*.[20] The Reports expressed Congress's intent to "overturn[] both the reasoning and holding of the Court in *Betts*." *OWBPA Senate Report* 17; *OWBPA House Report* 33. The Senate and House Reports also stated that the relevant Com-

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employee's long-term disability benefits the amount of "any pension benefits (other than those attributable to employee contributions) * * * paid to the individual that the individual voluntarily elects to receive; or * * * for which an individual who has attained the later of age 62 or normal retirement age is eligible." 29 U.S.C. 623(*l*)(3). That provision would be unnecessary, however, if employers could deny disability retirement benefits altogether to workers who have reached normal retirement age.

[20] In drafting the OWBPA, Congress brought employee benefits within the coverage of the ADEA's ban on age-based discrimination by enacting a new 29 U.S.C. 630(*l*), which provides that "the term 'compensation, terms, conditions, or privileges of employment' encompasses all employee benefits, including such benefits provided pursuant to a bona fide employee benefit plan." See OWBPA § 102, 104 Stat. 978; p. 41, *supra*. The OWBPA Committee Reports explain that, "[a]lthough this change could have been accomplished by adding corrective language directly to section [623](a)(1), the Committee[s] chose to avoid that option so as to reinforce congressional intent that the federal courts continue to interpret the substantive prohibitions of the ADEA like the comparable provisions of Title VII." *OWBPA Senate Report* 17; *OWBPA House Report* 33. That history reinforces the conclusion that the ADEA's general ban on age-based discrimination, like Title VII's prohibition on sex-based discrimination, encompasses all facially disparate treatment whether it is based on invidious stereotypes or statistically accurate generalizations. See pp. 22-23 & note 9, *supra*.

mittees had "purposefully eliminated the word 'subterfuge' from the new" cost-justification defense in order to clarify that, subject to any exceptions contained in the OWBPA itself, "the *only* justification for age discrimination in an employee benefit is the increased cost in providing the particular benefit to older individuals." *OWBPA Senate Report* 18; *OWBPA House Report* 34. Congress's shift from a motive-based "subterfuge" defense to an objective cost-justification test makes particularly erroneous petitioners' efforts to suggest that certain "non-malevolent motives" provide a basis for avoiding liability for facially discriminatory plans.[21]

The Reports also reflected Congress's understanding that the OWBPA's ban on age-based discrimination in employee benefits could not be evaded by using a surrogate for age, such as eligibility for normal retirement benefits, as a ground for disparate treatment. Thus, the Reports stated that "*pension benefits are age-related.* Pension eligibility is a proxy for age. Accordingly, it is *per se* age discrimination to use pension-eligibility as a basis for denying an older worker any other benefit." *OWBPA Senate*

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[21] Petitioners contend (Br. 40) that, in enacting the OWBPA, "Congress was focused on eliminating the blanket immunity for older retirement plans" (*i.e.*, those that predated the ADEA's enactment and therefore could not be regarded as "subterfuge[s]" under this Court's decision in *McMann*). That contention is inconsistent with the OWBPA's text and history, and petitioners cite nothing to support it. The Court's crucial holding in *Betts*—*i.e.*, that the phrase "compensation, terms, conditions, or privileges of employment" in Section 623(a)(1) did not encompass fringe benefits—was not limited to pre-Act plans. See 492 U.S. at 177, 181; note 17, *supra*. Congress enacted 29 U.S.C. 630(*l*) to supersede that holding, and the Senate and House Reports expressed disagreement with the *Betts* Court's analysis as it pertained to post-ADEA plans. See *OWBPA Senate Report* 18; *OWBPA House Report* 34.

Report 23; *OWBPA House Report* 40. In introducing the final Senate bill (S. 1511) to his colleagues, Representative Clay similarly explained: "We do not permit employers to pay an older worker less than a younger worker solely because of age; employers must be prohibited from providing older workers smaller benefits or no benefits solely because of their age or other proxies for age for example, pension or Medicare eligibility." 136 Cong. Rec. at 27,058.[22]

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[22] The OWBPA's legislative history also includes a statement prepared on behalf of the Association of Private Pension and Welfare Plans, in opposition to significant features of S. 1511. The statement reflects the Association's understanding of the OWBPA's potential impact on benefit plan provisions materially indistinguishable from the KRS provisions at issue in this case:

> Many plans also provide that employees may receive credited service for periods of disability prior to their normal retirement age. Such crediting of service assures that an employee is not prevented from accruing the benefit that the employee would have been able to earn if the employee had not been disabled. The conceptual framework of such a benefit program hinges on the assumption that an employee is entitled to such credit only for periods prior to normal retirement age. The additional service credited to an individual disabled at a younger age will always exceed the amount credited to an individual who is disabled when older, and therefore could present problems under S. 1511.

Older Workers Protection Act: Joint Hearing on S. 1511 Before the Subcomm. on Labor of the Senate Comm. on Labor and Human Resources and the Special Senate Comm. on Aging, 101st Cong., 1st Sess. 209-210 (1989). Notwithstanding that opposition—echoed by petitioners and their amici here—Congress enacted the OWBPA without exempting the age-based benefits enhancements described above.

E. The Position Of The EEOC Is Entitled To Deference

1. Even if the relevant ADEA provisions were ambiguous, it would be appropriate for this Court to defer to the reasonable view of the EEOC that disability retirement criteria like those at issue here violate the Act's general ban on age-based discrimination in employment. As explained above, the OWBPA established a cost-justification defense that incorporates by reference a pre-existing regulation promulgated by the EEOC. See 29 U.S.C. 623(f)(2)(B)(i) (providing that an employer may implement a bona fide employee benefit plan "where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker, as permissible under section 1625.10, title 29, Code of Federal Regulations (as in effect on June 22, 1989)"). That regulation is entitled "[c]osts and benefits under employee benefit plans," and it defines the circumstances under which the cost-justification defense is available. In enacting the OWBPA, Congress thus unequivocally endorsed the regulatory approach reflected in 29 C.F.R. 1625.10.

Although the primary purpose of the regulation is to define the circumstances under which facially discriminatory plan provisions will be exempt from the ADEA's proscriptions, rather than to address the antecedent question whether particular plan provisions *are* facially discriminatory, one subsection of the rule explains the "[r]elation of section [623](f)(2) [of 29 U.S.C.] to sections [623](a), [623](b) and [623](c)." 29 C.F.R. 1625.10(a)(2). That subsection states:

> Sections [623](a), [623](b) and [623](c) prohibit specified acts of discrimination on the basis of age. Section [623](a) in particular makes it unlawful for an employer

> to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age * * * ." Section [623](f)(2) is an exception to this general prohibition. *Where an employer under an employee benefit plan provides the same level of benefits to older workers as to younger workers, there is no violation of section [623](a), and accordingly the practice does not have to be justified under section [623](f)(2).*

Ibid. (emphasis added). The clear implication of the italicized language is that, if an employee benefit plan does *not* "provide[] the same level of benefits to older workers as to younger workers," the plan *will* violate Section 623(a) unless the cost-justification defense or some other statutory exception applies.

2. Guidance issued by the EEOC discusses the circumstances under which an employee benefit plan will be deemed to provide unequal benefits to older and younger workers. See 2 EEOC Compl. Man. (BNA) § 3 at 627:0001 (Oct. 3, 2000) (*EEOC Compliance Manual*). "[B]enefits will not be equal," the guidance explains, "where a plan reduces or eliminates benefits based on a criterion that is explicitly defined (in whole or in part) by age." *Id.* at 627:0004 (emphasis omitted). For example, "[w]here age is one of the criteria for service retirement eligibility," a plan that "denies disability benefits to any employee who is disabled less than 5 years from the date on which s/he would be eligible for service retirement" is using "an age-based distinction" to deny disability benefits. *Ibid.* The guidance further suggests that a chart showing the amount of benefits a plan would pay to employees of various ages, who are similarly situated in all other respects relevant to the benefit calculation, may be used to "determine if age was a factor that

made a difference in the employer's calculation of benefits." *Ibid.*; see J.A. 42; p. 6, *supra*.[23]

The guidance specifically discusses a benefit plan feature, like the one at issue in this case, that calculates an individual's disability retirement benefits by imputing an additional year of service for each year between the individual's age at the time of disability and the normal retirement age. See *EEOC Compliance Manual* 627:0009-627:0010. Under such a plan, the guidance explains, older workers will receive lower benefits than younger workers with the same tenure of actual service because "[b]asing disability retirement benefits on the number of years a disabled employee *would have worked* until normal retirement age by definition gives more constructive years of service to younger than to older employees." *Id.* at 627:0010 (footnote omitted). Because the benefits paid to older and younger workers under such a provision "are not equal," the guidance states, the employer will be in violation of the ADEA unless it can demonstrate that the Act's cost-justification defense applies. *Ibid.*; see 29 U.S.C. 623(f)(2)(B)(i). To establish that defense, "the employer would have to show that—accounting for the likelihood that more workers will qualify for disability retirement as they get older—it

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[23] The guidance further explains that "[b]enefits will * * * be equal if the employer's plan provides that older and younger employees will be paid the same monthly amounts until their deaths—even if the older employee has a shorter life expectancy and is thus likely to receive less in total benefits." *EEOC Compliance Manual* 627:0003. The EEOC's analysis thus focuses on whether similarly situated older and younger retirees receive the same monthly benefits, not on whether the two individuals receive benefit streams that have the same actuarial value as of the date of retirement. Cf. *Manhart*, 435 U.S. at 710 n.19 (noting that the employer in that case had "funded its death-benefit plan by equal contributions from male and female employees," even though a death benefit "has less value for persons with longer life expectancies").

costs as much to pay disability retirement to [older employees] based on [fewer] extra years of service as it does to pay disability retirement to [younger employees] based on [more] extra years of service." *EEOC Compliance Manual* 627:0010.

As explained above, 29 C.F.R. 1625.10(a)(2) indicates that the test for compliance under 29 U.S.C. 623(a)(1) is whether "an employer under an employee benefit plan provides the same level of benefits to older workers as to younger workers." The guidance confirms that this is the EEOC's test and illustrates its application to various scenarios, including circumstances materially indistinguishable from this case. Congress has unequivocally endorsed the regulation by incorporating it by reference into 29 U.S.C. 623(f)(2)(B)(i), and the EEOC's interpretation of its own rule "is controlling unless plainly erroneous or inconsistent with the regulations being interpreted." *Long Island Care at Home, Ltd.* v. *Coke*, 127 S. Ct. 2339, 2349 (2007) (citations and internal quotation marks omitted); see *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 512 (1994) (same); *City of Jackson*, 544 U.S. at 243-244 (Scalia, J., concurring in part and concurring in the judgment). Because the construction of 29 C.F.R. 1625.10 that is reflected in the guidance is consistent both with the text of the regulation and with the basic anti-discrimination provision contained in 29 U.S.C. 623(a)(1), it deserves controlling weight.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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